

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MICHAEL G. NEWMAN</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 186,258 & 189,497
<b>KANSAS ENTERPRISES, INC.</b>	)	
<b>d/b/a AAA EQUIPMENT &amp; SUPPLY</b>	)	
Respondent	)	
AND	)	
	)	
<b>WAUSAU UNDERWRITERS INSURANCE</b>	)	
<b>COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the May 4, 2000, Award of Administrative Law Judge John D. Clark. Oral argument was held September 8, 2000.

**APPEARANCES**

Claimant appeared by his attorney, Kelly W. Johnston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Larry Shoaf of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record set out in the Award was considered by the Appeals Board, and the stipulations of the parties set out in the Award were adopted by Appeals Board for purposes of this Order.

**ISSUES**

The following issues were set out in claimant's Application For Review:

- (1) Nature and extent of claimant's compensable permanent impairment of function resulting from each stipulated accident.

- (2) Whether claimant is entitled to permanent work disability benefits, and the extent thereof, as a result of the stipulated October 29, 1993, accident.
- (3) Whether claimant is entitled to permanent work disability benefits, and the extent thereof, as a result of the stipulated November 17, 1993, accident.
- (4) Whether claimant's work activities on behalf of respondent, prior to termination, were restricted and accommodated as a result of either or both stipulated accidents.
- (5) Whether claimant's continuing medical care, or restricted and accommodated work activities on behalf of respondent, played a role in causing his involuntary termination.
- (6) Even if claimant's post-accident job and work performance were neither restricted nor specially accommodated by the employer, is he nevertheless eligible for work disability benefits?
- (7) Against whom should the costs of the deposition transcripts be borne?

At oral argument, the parties agreed that the deposition transcript costs dispute had been resolved and was no longer at issue before the Appeals Board. Additionally, respondent alleges with regard to the November 17, 1993, date of accident that, pursuant to K.S.A. 44-501(c) and Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996), claimant was not disabled for a period of at least one week from earning full wages with respondent and should, therefore, be denied an award, being limited to an award of medical expenses only.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Appeals Board finds the Administrative Law Judge's analysis of the evidence as set forth in the Award is accurate and supported by the record. The Appeals Board adopts the findings and the conclusions of the Administrative Law Judge and the conclusions as specifically set forth in the Award.

In particular, the Appeals Board finds the application of Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997), to be proper. Claimant returned to work at his regular job in an unaccommodated position and continued working there until his termination. This termination occurred nearly a year after claimant's original injuries. Claimant, in support of his allegation that he is entitled to a work disability, cites Gadberry v. R.L. Polk & Co., 25 Kan. App. 2d 800, 975 P.2d 807 (1998). However, in Gadberry, unlike here, the claimant was terminated just a few weeks after being returned to work. Additionally, the record in Gadberry reflected that the claimant had been advised prior to her surgery that Polk was going to downsize, but that she would not be affected. The Court of Appeals, in Gadberry, found the timing of that termination to be suspect. Here, however, claimant worked for nearly a year after the second accident before being terminated. In addition, the evidence indicates that claimant's termination was due to a lack of sales and not his injuries. The Appeals Board, therefore, finds the application of Watkins to be appropriate in this instance, and claimant is limited to his functional impairment for both the October 29, 1993, and November 17, 1993, injuries.

Respondent argues in its brief that claimant should be precluded from any award for the November 17, 1993, accident as claimant was not disabled for a period of at least one week from earning full wages, citing to Boucher v. Peerless Products, Inc., *supra*. However, claimant testified that both William Simon, D.O., and Robert L. Eyster, M.D., sent him home to rest for several days on account of his low back injury. This evidence is uncontradicted. As noted in Overstreet v. Mid-West Conveyor Co., Inc., 26 Kan. App. 2d 586, 994 P.2d 639 (1999), medical evidence is not essential to support a finding of disability, citing Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). A claimant's testimony may support a finding of disability including whether the application of Boucher is proper. In this instance, claimant's testimony is sufficient to show that he was disabled for a period of at least one week from earning full wages pursuant to K.S.A. 44-501(c).

Pursuant to the above, the Appeals Board finds that the Award of the Administrative Law Judge limiting claimant to his functional impairment is appropriate. Additionally, the functional impairment opinions of the independent medical examination physician, Philip R. Mills, M.D., are the most credible. The substantial difference in opinions between Pedro A. Murati, M.D., and Dr. Eyster regarding claimant's functional impairment suggested the use of an independent examining physician in order to resolve the conflict. Claimant is awarded an 8 percent permanent partial disability to the body as a whole for the injuries suffered on October 29, 1993, and a 1 percent permanent partial disability to the body as a whole for the injuries suffered on November 17, 1993.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated May 4, 2000, should be, and is hereby, affirmed.

The fees necessary to defray the expenses of the administration of the Workers Compensation Act, as noted in the Administrative Law Judge's Award, are hereby assessed against the respondent and its insurance company.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS  
Larry Shoaf, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director